IN THE COURT OF APPEALS OF IOWA

No. 9-641 / 08-1883
Filed September 17, 2009

DONNELLE HOFFMAN,
Plaintiff-Appellee,

vs.

TODD CARLOCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Gary D. McKenrick (motions for additional time to serve original notice and for service by publication) and David H. Sivright Jr. (motion to dismiss), Judges.

In this interlocutory appeal, Todd Carlock contends the district court erred in denying his motion to dismiss. **AFFIRMED.**

James L. Pillers of Pillers Law Offices, P.C., Clinton, for appellant.

Donnelle Hoffman, Clinton, pro se.

Considered by Vogel, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

In this interlocutory appeal, Todd Carlock contends the district court erred in denying his motion to dismiss.[1] We affirm.

I. Background Facts and Proceedings.

On May 7, 2007, Donnelle Hoffman filed suit against Todd Carlock asserting claims of fraud, undue influence, and breach of fiduciary duty. Hoffman asserted the two had an intimate relationship from September 2005 through November 2006, during which she alleges Carlock misappropriated monies she obtained as a result of a settlement after she sustained serious personal injuries in a motor vehicle collision.

On February 7, 2008, the district court issued a notice of pending dismissal for case inactivity. On February 27, 2008, the court issued an order vacating the notice of pending dismissal.

On February 29, 2008, Hoffman filed motions for extension of timelines for service and for service by publication. The motions were supported by affidavits noting numerous unsuccessful attempts at personal service upon Carlock—first in Iowa, then in Minnesota. The court granted the motion for extension of timelines finding that "Personal Service has been attempted by three different Sheriff Departments and one Private Process Server but each has been unsuccessful at serving Defendant." The court also granted the motion for service by publication based upon the same finding.

[1] Carlock's appellate brief states the issue is whether the district court "erred as a matter of law when it overruled defendant's Motion to Quash Service (Motion to Dismiss) based on plaintiff's failure to comply with Iowa R. Civ. P. 1.302(5)." The district court treated the filing as a motion to dismiss, as will we.

Notice of the suit was published in the Clinton Herald (Iowa) on May 15, 22, and 29, 2008. Notice of the suit was published in the Woodbury Bulletin (Minnesota) on May 21 and 28, and June 4, 2008.

On June 18, 2008, Carlock filed a motion to quash service of process and dismiss the action, asserting:

> 1. Plaintiffs' Petition at Law was filed May 2, 2007.
> 2. No personal service has been had upon the Defendant.
> . . . .
> 5. Defendant was a resident of Clinton County, Iowa for more than 90 days after the date of filing of the Petition at law.
> . . . .
> 9. Plaintiff obtained an order of the court to serve the Defendant, Todd Carlock, by publication in Iowa after Defendant moved from Iowa.
> 10. Publication is not personal service as required under Iowa Rule 1.305 or Iowa Rule 1.306, within or without the state of Iowa.
> 11. Serving the Defendant more than one year after the date of the filing of the Petition at Law is not consistent with fairness or Iowa law. . . .
> 12. That service on an individual out of state by publication (within the state of Iowa) seeking a money judgment is in violation of the due process parameters of the Iowa Constitution and the United States Constitution.
> 13. The Defendant has insufficient "minimum contacts" with the State of Iowa for the court to exercise jurisdiction over him.

Following a hearing, the district court ruled: (1) while the plaintiff's motion for extension of time to accomplish service of original notice was untimely, the district court impliedly found good cause to grant plaintiff an extension of time to complete service by publication; (2) the defendant had sufficient contacts with the state of Iowa to invoke the court's jurisdiction; and (3) the court authorized service of notice by publication, and the plaintiff published notice in both Iowa and Minnesota and, consequently, defendant was not denied due process.

Carlock filed an application for interlocutory appeal, which the supreme court granted. The case was transferred to this court. Carlock contends the district court erred as a matter of law in overruling his motion to dismiss based on Hoffman's failure to comply with Iowa Rule of Civil Procedure 1.302(5). We affirm.

II. Scope and Standard of Review.

We review a motion to dismiss for failure to effect timely service of process for the correction of errors at law. *Wilson v. Ribbens*, 678 N.W.2d 417, 418 (Iowa 2004); *Carroll v. Martir,* 610 N.W.2d 850, 857 (Iowa 2000); *Henry v. Shober,* 566 N.W.2d 190, 191 (Iowa 1997). Where the district court makes findings of fact, those findings are binding upon us so long as they are supported by substantial evidence. *Wilson*, 678 N.W.2d at 418. We are not, however, bound by the district court's legal conclusions or application thereof. *Id.*

III. Merits.

We begin our analysis with the recognition the Iowa Rules of Civil Procedure "are to be liberally construed for the purpose of promoting the speedy determination of litigation upon its merits. . . ." *Id.* at 420.

A civil action is commenced when a petition is filed in the district court. Iowa R. Civ. P. 1.301(1). The plaintiff must also serve the defendant with notice the action was filed. *See* Iowa R. Civ. P. 1.302. Our rules of civil procedure expressly require plaintiffs to effect service within ninety days after the filing of the petition, or risk dismissal. Iowa R. Civ. P. 1.302; *see Meier v. Senecaut,* 641 N.W.2d 532, 541 (Iowa 2002). If good cause is shown for failure of service within the ninety days, the court *must* grant an extension. *Wilson*, 678 N.W.2d at 420

("The present rule clearly requires a court to grant an extension to the ninety-day requirement on a showing of good cause.")

"Good cause" means "[t]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action." *Henry,* 566 N.W.2d at 192-93 (citation omitted). When the failure to complete service in a timely fashion is a result of the conduct of a third person, i.e., the defendant has evaded service of the process or engaged in misleading conduct, good cause is "likely (but not always) to be found." *Wilson*, 678 N.W.2d at 421 (citation omitted). So, too, when "the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances." *Id.*

With these principles in mind, we review the district court's finding that there was good cause for the delay in service. The district court concluded that, though untimely,[2] the plaintiff's February 2008 motion to extend time to effect service was supported by good cause, citing the numerous instances of attempted service. In her petition, Hoffman alleged Carlock was a resident of Clinton County, Iowa. She attempted personal service upon Carlock in Clinton County, Iowa. However, on a return of service filed May 31, 2007, the Clinton County sheriff noted, "Unable to serve Todd Carlock. He is living in Minnesota." Plaintiff thereafter attempted personal service upon Carlock in Minnesota.

[2] In *Wilson*, the court noted that ninety days was chosen in order that service would be perfected prior to the issuance of scheduling orders by most courts. *Wilson*, 678 N.W.2d at 423-24. Here, as was the case in *Wilson*, there is no evidence the district court had filed a scheduling order. *See id*. at 424 (noting parties' agreement not to effect timely service allowed case to languish for a year because no scheduling order was filed). We reiterate the *Wilson* court's admonition that "diligent court administration should obviate the need for courts to rule" on motions to dismiss for failure to effect timely service. *Id*.

In a February 21, 2008 affidavit of a process server, the server asserts some thirteen attempts of service at Carlock's employer:

> While attempting at the work place, the front desk person told me Todd drives truck in the five state area and his schedule is always changing and would not give me any specifics as to when he would be around.

In addition, service was attempted at two personal addresses. None of the attempts were successful. In the motion for service by publication, the plaintiff asserted that Carlock was resident of Iowa "who has departed therefrom with the intent to avoid service." The district court granted additional time, and (as the court later wrote) "impliedly found good cause to grant plaintiff an extension of time to complete service by publication."

We conclude there is substantial evidence to support the district court's finding that good cause existed for the delay in service. There is sufficient showing that "[t]he plaintiff [has] taken some affirmative action to effectuate service of process upon the defendant or [has] been prohibited, through no fault of [her] own, from taking such an affirmative action." *Henry,* 566 N.W.2d at 192-93. Carlock's whereabouts were uncertain; perhaps purposely so. We note his contradictory pleadings. In Carlock's motion to quash and in his application for interlocutory appeal, he asserted that he was a resident of Clinton County, Iowa, at the time the petition was filed. In fact, in his motion to quash he stated he "was a resident of Clinton County, Iowa for more than 90 days after the date of filing of the Petition at Law." He argues that the plaintiff should have personally served him in Iowa.

Yet now, Carlock asserts in his appellate brief, "Hoffman filed her Petition at Law on May 2, 2007. Carlock was no longer a resident of Clinton County, Iowa. He sold his residence in Camanche, Iowa in November of 2006 and relocated to Minnesota where he found employment." He argues that because he was not a resident of Iowa, the plaintiff should have served him by publication "in June or July 2007."

Because there was good cause for delay in service, the motion to dismiss was properly overruled. We therefore affirm.

AFFIRMED.